Supreme Court, U.S.
FILED
981134 JAN 14 1999
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

IVAN RODRIGUEZ,

Petitioner,

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE
OF THE UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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January 14, 1999

54 pp

QUESTION PRESENTED

Whether an employer is liable for discrimination where the ultimate decision-maker relies, in good faith, on the falsehoods of a supervisor who has a motive to discriminate against the employee?*

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* The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivan Rodriguez respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on August 20, 1998. The court denied Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc on October 16, 1998.

OPINIONS BELOW

Ivan Rodriguez filed a complaint on March 10, 1995, in the United States District Court for the District of Maryland, alleging employment discrimination on the basis of his national origin. On April 21, 1997, the district court granted summary judgment to defendant on all counts. The decision of the district court is set out at pp. A-19 – A-30 of the Appendix.

Following oral argument, a three-judge panel of the Fourth Circuit affirmed the district court's decision. The Fourth Circuit's decision, *Rodriguez v. Kantor*, Case No. 97-1668 (4th Cir. 1998), is set out at pp. A-1 – A-16 of the Appendix. The Court ruled that Count I, which alleged discrimination in the terms and conditions of employment, was properly dismissed because Mr. Rodriguez failed to allege an adverse employment action. App at A-9. According to the appellate court, this Count also failed because Mr. Rodriguez did not produce evidence of a hostile environment based on national origin. App at A-11. The Court affirmed dismissal of Count II – the discriminatory discharge claim – because there was no evidence showing that Mr. Rabbitt, Lynch's supervisor and the ultimate decision-maker, acted in bad faith. App at A-14. Finally, the Court concluded that the retaliation charge in Count III was properly dismissed because Mr. Rodriguez failed to show that he complained of national origin discrimination. App at A-15. The Court also ruled that Mr. Rodriguez failed to show a causal connection between his complaint and the adverse action. *See id.*

JURISDICTION

The decision of the court of appeals was entered on August 20, 1998. Appellant petitioned for rehearing with suggestion for rehearing *en banc*, which the court denied on October 16, 1998. This Petition is timely in accordance with

the 90 day filing requirement of Supreme Court Rule 13.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent portions of 42 U.S.C. § 2000e-16 are set out at pp. A-31 of the Appendix.

STATEMENT OF THE CASE

Petitioner, Ivan Rodriguez, commenced this action in 1995 in the United States District Court for the District of Maryland against Ronald Brown, then Secretary of Commerce of the United States of America, alleging employment discrimination on the basis of his national origin. The action arises out of Mr. Rodriguez' employment as a custodial worker with the National Institute of Standards and Technology ("NIST") at the Department of Commerce (the "Agency") from December 13, 1993 until his termination less than three months later, on March 7, 1994. The jurisdiction of the district court in this action was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and under 28 U.S.C. § 1331 (general federal question jurisdiction).

Throughout his brief employment with NIST, Mr. Rodriguez' responsibilities included throwing out or "pulling" trash and recyclable material form the various buildings on the NIST campus. He was also responsible for stripping and waxing floors. Patricia Lynch, the Janitorial Services Group Leader, Facilities Services Division ("FSD"), who is white, was Mr. Rodriguez' second line supervisor. Joint Appendix ("JA) 111.[1]

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[1] All references to the Joint Appendix are cited "JA" followed by the relevant page number(s). The Joint Appendix was filed in the Fourth Circuit along with the

As petitioner set forth at length in both his brief opposing defendant's motion for summary judgment and his brief appealing the district court's decision granting summary judgment in favor of defendant on all counts, Mrs. Lynch was prejudiced against Mr. Rodriguez because he is Hispanic and sought his termination because of his Hispanic national origin.

The record evidence demonstrates that Mrs. Lynch directed her hatred of Hispanics toward Mr. Rodriguez on numerous occasions. For instance, among other discriminatory comments, she explicitly stated that "she did not want to hire any more minorities" (Testimony of Richard DiLisi, a custodian who worked with Mr. Rodriguez; JA 300), and "If I had my way, I would not hire Hispanics" (Testimony of Charles N. Lyles, Mr. Rodriguez' first line supervisor; JA 283-284).

Mr. Rodriguez began working in the Janitor Group on January 4, 1994. JA 49. Mr. Lyles, Mr. Rodriguez' African American first-line supervisor, recognized the quality of Mr. Rodriguez' work, stating that "As his immediate supervisor, it is my opinion that Mr. Rodriguez did an excellent job of pulling trash and stripping and waxing floors. He had a commendable work ethic and was always very polite and respectful." JA 284.

Despite such accolades from others, Mrs. Lynch was hypercritical of Mr. Rodriguez' performance. She continually yelled at him, gave him unrealistic assignments, subjected him to rules that applied only to him, found fault with his work, and isolated him from his colleagues. It appeared to Mr. Rodriguez's supervisors, Wilson and Lyles, that Mrs. Lynch was trying to get Mr. Rodriguez to resign. JA 285-293.

The final and most severe action taken by Mrs. Lynch in her efforts to get rid of Mr. Rodriguez was her fabrication of a story that Mr. Rodriguez threatened her life.

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briefs of petitioner and respondent submitted thereto; however, it is not appended to this Petition.

She reported this fabricated story to Mr. Rabbitt, who then terminated Mr. Rodriguez' employment.

Mr. Rodriguez presented evidence that Mrs. Lynch fabricated the threat against her Mr. Rodriguez also presented evidence that the three co-workers who testified on Mrs. Lynch's behalf had a motive to lie because they were all indebted to Mrs. Lynch for favors.

The district court held that evidence of Mrs. Lynch's prejudice and the co-workers' possible motive to falsify affidavits was irrelevant to Mr. Rodriguez' discriminatory discharge claim because the person who rendered the decision to terminate Mr. Rodriguez, Mr. Rabbit, acted in "good faith" and was unaware of Mrs. Lynch's discriminatory animus and the co-workers' motive to falsify their affidavits:

> These arguments, even if true, fail to demonstrate that Mr. Rodriguez was not terminated because of Mr. Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal.

App at A-29.

The court of appeals panel explicitly adopted the district court's rule stating:

> The district court concluded correctly that Rodriguez failed to "demonstrate that [he] was not terminated because of Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal." The district court also noted correctly that Rodriguez did not produce any evidence to show that Rabbitt terminated Rodriguez because of his national origin.

App at A-14. Thus, disregarding all of the evidence of Mrs. Lynch's discriminatory and retaliatory conduct, the co-worker's motive to lie, and Mr. Rabbitt's reliance on these fabrications, the Fourth Circuit Court of Appeals affirmed the district court holding that an employer is not liable for discriminatory discharge where the decision-maker acts in good faith, even where the good faith decision is based upon the falsehoods of a supervisor who has a motive to discriminate.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit permits an employer to escape liability for employment discrimination so long as the decision-maker acts in good faith. Thus, the employer is not liable even in situations, like the one here, where the innocent decision-maker relies upon false information provided by a biased supervisor. As explained in greater detail below, no Circuit in the United States has adopted the Fourth Circuit's holding in this case, and the Fourth Circuit's holding is in contravention of this Court's recent decision in *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998). As such, a writ of certiorari should issue.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF ALL OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE

The core holding adopted by the court below is that an employer will escape liability for employment discrimination where the decision-maker acts in good faith:

> The district court concluded correctly that Rodriguez failed to "demonstrate that [he] was not terminated because of Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct

> serious enough to warrant dismissal." The district court also noted correctly that Rodriguez did not produce any evidence to show that Rabbitt terminated Rodriguez because of his national origin.

App at A-14.

All of the other circuits that have addressed this issue have expressly rejected the Fourth Circuit's rule and have all held that, under Title VII, an employer can be liable for adverse action taken against an employee, even where the ultimate decision-maker acts in good faith, so long as there is evidence that the innocent decision-maker relied upon or was influenced by false information provided by a supervisor who had a discriminatory motivation.

The Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) reversed a lower court's entry of summary judgment in favor of the employer where there was evidence that the independent committee that reviewed and approved the decision to terminate the appellant might have been influenced by the allegedly discriminatory animus of the appellant's supervisor, stating:

> If [the committee] acted as the conduit of [the supervisor's] prejudice – his cat's-paw – the innocence of its members would not spare the company from liability.

See id. at 405

Circuit courts throughout the nation hold that an employer may be liable for adverse action against an employee where the decision-maker, in good-faith, relies upon false information provided by a subordinate who has a motive to discriminate against the employee.

For example, the Fifth Circuit held in *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) that:

> If . . . [the decision-maker] did not conduct his own independent investigation, and instead merely 'rubber stamped' the recommendations of [those who held the discriminatory animus], the causal link between [the plaintiffs'] protected activities and their subsequent termination, would remain intact.

See also Steverson v. Goldstein, 24 F.3d 666, 670 (5th Cir. 1994) (rejecting the defendant-employer's argument that "[plaintiff's supervisor's] 'actions cannot be imputed to the [defendant] because he is not the final decision maker and because of the Commission's subsequent actions in reviewing the discipline[]'" and, therefore, upholding lower court's decision that the employer was liable for discriminatory suspension of the plaintiff).

The Sixth Circuit held in *Simpson v. Diversitech Gen'l, Inc.*, 945 F.2d 156, 160 (6th Cir. 1991) that:

> If [plaintiff's supervisor] initiated the disciplinary action leading to [plaintiff's] dismissal due to [plaintiff's] race, simply showing that [plaintiff's supervisor] had no role in the 'final' decision to terminate him is insufficient to establish that [defendant-company] would have made the same decision even absent the racial animus" and, therefore, was insufficient to overcome liability.

The Eight Circuit holds that:

> '[A]n employer cannot escape responsibility for discrimination when

> the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of women[]'.

Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1323 (8th Cir. 1994) (internal punctuation and citations omitted).

In *Perez v. Curcio*, 841 F.2d 255, 258 (9th Cir. 1988) the Ninth Circuit held that:

> The district court erred in finding that [plaintiff's supervisor] was not involved in the demotion decision [where there was evidence that the supervisor] made the report that motivated the investigation . . . Although most of [plaintiff's] evidence of [her supervisor's] intent is remote from the actual demotion decision, and although the evidence of [her supervisor's] intent to discriminate is weak, the strength of the evidence is a question for the jury, not for the court on summary judgment.

The Eleventh Circuit holds that summary judgment is inappropriate where there is an issue of material fact as to whether the alleged harasser influenced the decision-maker to fire plaintiff. *See Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1565 (11th Cir. 1987).

Finally the District of Columbia Circuit holds that:

> [W]e join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not

> insulated from the subordinate's influence.

Griffin v. Washington Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998).

In short, all circuits that have addressed this issue are in conflict with the Fourth Circuit. This is an important conflict that the Court should resolve. The Fourth Circuit's rule will permit employers to mask possibly discriminatory actions by having a management employee, who has no connection with the disputed employment decision, review the decision and approve it. So long as the management employee is isolated from any discriminatory motivations, the employment action will not be discriminatory even if the information the management employee relies upon has been filtered through a supervisor intent on ridding the workforce of a minorities. The Court should not let this rule stand in the Fourth Circuit.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *ELLERTH*

In *Burlington Indus. v. Ellerth*, 118 S.Ct. 2257 (1998), the Court explained that an employer is always liable for a supervisor's discriminatory acts when the supervisor's actions result in a tangible employment loss for the employee. *See id.* at 2268 (stating, "Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in a tangible employment action . . . Although few courts have elaborated how agency principles support this rule, we think it reflects a correct application of the aided in the agency relation standard").

The Court also addressed the particular question at issue in this petition; that is, whether an employer is liable when the decision to terminate is made by a more senior official who unknowingly relies on falsehoods provided by

the discriminating supervisor. *See id.* at 2269. The Court answered this question in the affirmative:

> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. E.g., Shager v. Upjohn Co., 913 F.2d 398, 405 (C.A. 7 1990) (noting that the supervisor did not fire plaintiff; rather, the Career Path Committee did, but the employer was still liable because the Committee functioned as the supervisor's "cat's paw"). The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

Id. (italics omitted in original).

Applying the Supreme Court rule in *Ellerth* to the facts of this case, the relevant question is not whether Mr. Rabbitt acted in good faith, as the district and appellate courts held, but, instead, whether there is evidence from which a jury could believe that Mrs. Lynch, petitioner's supervisor, discriminated and retaliated against him by fabricating alleged threats in order to get Mr. Rodriguez fired. If there is such evidence, then, in accordance with *Ellerth*, Mrs. Lynch's discriminatory act should be imputed to the Agency regardless of Mr. Rabbitt's alleged good faith. Taking into account that "[t]he evidence of [Mr. Rodriguez] is to be believed, and all justifiable inferences are to be drawn in his favor," *Anderson v. Liberty Lobby*, 477 U.S.

242, 255 (1986), a factfinder could easily draw such a conclusion from the totality of the evidence in this case.

The evidence of discriminatory and retaliatory motive on the part of petitioner's supervisor, Mrs. Lynch, is overwhelming. The following statements are instructive:

> Before Mr. Rodriguez was hired, Mrs. Lynch told me that she did not want to hire any foreigners. At a later date, Mrs. Lynch said, "Mr. Rodriguez, who is Spanish and from New York will be coming on board. I do not want to hire him, but I have no choice."

JA 283-284. (Testimony of Charles N. Lyles, Mr. Rodriguez' first line supervisor).

> Sometime, I believe that it was during the month of November 1993, Mrs. Lynch entered my work area and said, "I have to hire this son of a bitch whether I want to or not." I asked her who she was referring to and she said, "this guy Rodriguez."
>
> She further stated, "as you know, Hispanics and Blacks do not get along together. If I had my way, I would not hire Hispanics."

JA 292. (Testimony of Henry L. Wilson, another first line supervisor).

> [Mrs. Lynch] said that she did not like [Mr. Rodriguez] because he was Hispanic and she believed that Hispanics and Blacks do not get along.

> On another occasion before Mr. Rodriguez reported for duty, Mrs. Lynch told me that Hispanics and Vietnamese come to this county and take jobs from Americans.

JA 309. (Testimony of Delores W. Christian, a support clerk in FSD).

> Before Mr. Rodriguez was hired, I heard Mrs. Lynch say she did not want to hire any more minorities, but that a Hispanic was going to come on board shortly.

JA 300. (Testimony of Richard DiLisi, a custodian who worked with Mr. Rodriguez).

The absence of any reference to this direct evidence of the discriminatory animus of Mr. Rodriguez' supervisor indicates that the court of appeals panel considered this evidence totally irrelevant to the question of whether the employer should be liable in this case. Under *Ellerth*, such blatant evidence must be factored into the analysis.

Moreover, the court of appeal's rule that where the decision-maker acts in good faith an employer is insulated from liability, regardless of the decision-maker's reliance on fabrications of racist supervisor, led the appellate panel to discount significant circumstantial evidence of Mrs. Lynch's discriminatory and retaliatory motive as well.

First, it was Mrs. Lynch who brought to the attention of Mr. Rabbitt the alleged threats – and not the persons who allegedly heard the threats – mere days after Mr. Rabbitt told Mrs. Lynch that Mr. Rodriguez had been in to see him about her conduct. JA 54-55, 197.

Second, there was evidence to support the fact that Mrs. Lynch had blown out of proportion the reports of Oyre, Shanholtz and Clary that Mr. Rodriguez had allegedly threatened Mrs. Lynch. Their reports hardly appeared to

indicate a serious threat. Neither Mr. Clary nor Mr. Oyre thought Mr. Rodriguez was serious about the alleged threats. JA 346, 396. All three persons who heard the alleged threats testified that they were made at a time when employees blow off steam at the end of the day. JA 356, 396, 389. Comments like the ones that Mr. Rodriguez is alleged to have made were not uncommon. JA 354-355, 387. Additionally, Mr. Clary, Mr. Oyre and Mrs. Shanholtz did not immediately report what they allegedly heard Mr. Rodriguez say to management. The only reason management found out about the alleged statements was because Mrs. Shanholtz allegedly mentioned it to Mrs. Lynch in a conversation initiated by Mrs. Lynch herself approximately two weeks after the alleged statements were made and mere days after Mrs. Lynch was apprised that Mr. Rodriguez complained about her to Mr. Rabbitt. A jury could conclude from this evidence that Mrs. Lynch plucked out of context and distorted idle banter among employees shared at the end of the workday in order to further her discriminatory and retaliatory motives.

Third, Mrs. Lynch's actions were wholly inconsistent with the notion that she had been threatened. Mrs. Lynch did not ask for protection when she solicited the statements from Mrs. Shanholtz. Indeed, she continued to work with Mr. Rodriguez and to give him assignments. JA 114, 282, 196, 214, 226.

Fourth, Mrs. Lynch could not have seriously entertained any notion that Mr. Rodriguez' alleged actions warranted his termination because she engaged in the same kind of behavior with impunity. When she learned that Mr. Rodriguez had filed a complaint against her, Mrs. Lynch threatened to hire someone to shoot Mr. Rodriguez. Mrs. Lynch stated this threat to Mr. Oyre –one of Mr. Rodriguez' accusers. JA 300-301.

Fifth, Mr. Rodriguez has consistently denied making any kind of threatening comment against Mrs. Lynch. JA 52, 56. The appellate panel's statement that Mr. Rodriguez refused to fill out an affidavit denying the threats is incorrect.

App at A-14. In fact, Mr. Rodriguez verbally denied the threats and left with forms to enable him to fill out an affidavit. JA 405.

Sixth, a reasonable jury could conclude that Mrs. Lynch was able to get her three subordinates – Hoffman, Oyre and Shanholtz -- who testified that Mr. Rodriguez made the threats to lie at her request because they were all indebted to her for favors. Mrs. Lynch required Mr. Rodriguez to leave one or more spaces on a sign-in sheet (between his name and the last person to previously sign-in) so that three white employees -- Oyre, Shanholtz and Clary -- could sign in late and falsely state that they had arrived before the time Mr. Rodriguez signed in at 9:30 a.m.. JA 57, 308. Delores Christian, the timekeeper, corroborated that Mrs. Lynch required Mr. Rodriguez to leave space on the time-sheets. JA 308.

A jury could well conclude that Oyre, Shanholtz and Clary also lied at Mrs. Lynch's request because they owed their continued employment to staying in her good graces. As the appellate panel concluded, the evidence showed that "Lynch tended to be overbearing on her employees, and aspired to exact over them a level of control that was ultimately unattainable." App at A-6.

In light of the *Ellerth* case and the evidence cited above, it is irrelevant that Mr. Rabbitt acted in good faith with the approval of the personnel office in deciding to terminate Mr. Rodriguez. What is relevant is whether Mr. Rabbitt unknowingly relied upon lies provided by a prejudiced supervisor. The evidence above, viewed in a light most favorable to Mr. Rodriguez, would lead a reasonable fact-finder to conclude that the prejudiced supervisor, Mrs. Lynch, "set-up" Mr. Rodriguez with false accusations of threats, and that she did so because Mr. Rodriguez was Hispanic and complained of her discriminatory treatment of him. JA 54-55. Mrs. Lynch then used the Agency's disciplinary process as the conduit of her prejudice.

Accordingly, the Court should grant petitioner's writ of certiorari in order to address the Fourth Circuit's rule, which is in conflict with the Court's *Ellerth* decision.

III. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

This case presents important issues of substantial importance because it will have a very real impact on the way employees are treated in the Fourth Circuit. For example, a racist supervisor now knows that he can terminate a black subordinate because of that subordinate's race so long as he comes up with what sounds like a plausible reason and gets a supervisor, who is not familiar with his bias, to sign off on his termination recommendation. The employer's defense will be air tight so long as the employee cannot prove that the approving supervisor was aware of the biased supervisor's discriminatory motivation. The employer will escape liability if the approving supervisor acted in good faith on the recommendation or influence of the racist supervisor. The Court should take this powerful weapon out of the hands of employers in the Fourth Circuit.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

IVAN A. RODRIGUEZ,
Plaintiff-Appellant,

v.

MICHAEL KANTOR, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 97-1668

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Catherine C. Blake, District Judge.
(CA-95-710-CCB)

Argued: June 5, 1998

Decided: August 20, 1998

Before HAMILTON and MOTZ, Circuit Judges, and
WILLIAMS, Senior United States District Judge
for the Eastern District of Virginia,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Michael Gerard Kane, CASHDAN & GOLDEN, Washington, D.C., for Appellant. Perry F. Sekus, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Vicki G.

Golden, David R. Cashdan, CASHDAN & GOLDEN, Washington, D.C., for Appellant. Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Introduction

This matter is before the Court on appeal of the district court's granting of summary judgment in favor of defendant on Counts I, II, and III of the Complaint.

Statement of the Issues

1. Whether the district court properly entered summary judgment on the defendant-appellee's behalf on plaintiff-appellant's claim under the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), where Rodriguez failed to show that he was subjected to disparate treatment because of his national origin.

2. Whether the district court correctly determined that Rodriguez was not unlawfully terminated because the evidence showed that he threatened the life of his supervisor.

3. Whether the district court properly granted summary judgment in favor of the defendant on plaintiff's retaliation claim where there was no evidence from which a jury could reasonably find that the defendant's legitimate business reason for terminating Rodriguez was pretextual.

Procedural History

Rodriguez filed an EEO complaint with the NIST Office on June 1, 1994. He alleged that he was discriminated against on the basis of his national origin during his brief period of employment at NIST. He also alleged that NIST retaliated against him after he purportedly complained that his second-line supervisor, Patricia Lynch, had discriminated against him.

On March 4, 1994, prior to filing his complaint, Rodriguez met with an EEO counselor. On August 8, 1994, the agency assigned his complaint for investigation. On November 28, 1994, EEOC Administrative Judge Veronica Burgess King notified Rodriguez that a hearing on his EEO complaint would be held on April 6, 1995. On March 2, 1995 Rodriguez notified the Administrative Judge that he intended to file a civil complaint in U.S. District Court for the District of Maryland and that accordingly, an administrative hearing would not be necessary. Consequently, on March 7, 1995, the Administrative Judge dismissed Rodriguez' case.

On March 10, 1995 Rodriguez filed his complaint in district court alleging two counts of national origin discrimination and one count of retaliation. In a Memorandum and Order dated April 21, 1997 Judge Catherine Blake granted the Secretary's motion for summary judgment.

Facts: The Hiring Stage

In December of 1992, NIST posted a vacancy announcement for several custodial positions. Rodriguez applied for one of these positions. In February 1993 Patricia Lynch, who served as the Group Leader for Janitorial Services at NIST, contacted Rodriguez for an interview. At that time there were no persons of Hispanic origin on NIST's custodial staff. According to her affidavit testimony, Lynch was "pleased" that Rodriguez applied for a custodial position because "we wanted to obtain as diverse a work force as possible." Based on the interview between Rodriguez and Lynch, Lynch contacted Kathy DelBalzo, a Personnel Management Specialist in NIST's Office of Personnel, to recommend that Rodriguez be selected for the position. DelBalzo notified Rodriguez by telephone that he had been tenta-

tively selected for employment at NIST, pending passage of a medical exam and a performance test.

Shortly after recommending Rodriguez for employment, Lynch received a negative reference from Rodriguez' former employer. The reference stated that Rodriguez had been "terminated" and that he was not eligible for rehire. In light of this information and an additional negative reference from another former employer of Rodriguez, Lynch recommended to Ellen Dowd, NIST's Personnel Officer, that Rodriguez' offer of employment should be rescinded. Before sending the memo to Dowd, Lynch provided a copy to Walter Rabbitt, the Chief of Facilities Services, for his review and signature. Rabbitt opted not to sign the memorandum.

On May 17, 1993 Rabbitt drafted a memo to Lynch, advising her to acquire more information about Rodriguez' previous employment. Lynch followed this advice and informed Rabbitt that she still believed Rodriguez' offer of employment should be rescinded. Rabbitt did not follow Lynch's advice, but concluded instead that the agency should go forward with its plans to hire Rodriguez. On September 9, 1993 DelBalzo sent another letter to Rodriguez informing him he had been tentatively selected for the job. After he passed his physical and practical examinations, the agency extended to Rodriguez a formal offer of employment and he began work on December 13, 1993.

Rabbitt temporarily assigned Rodriguez to the mail room because, according to Lynch, Lynch wanted to conduct a joint orientation session with Rodriguez and two other employees who were due to join the work force at NIST within a few weeks. Rodriguez contends that he was placed in the mail room as a result of Lynch's racially hostile attitude towards him.

During Rodriguez' brief tenure at NIST, Mr. Lyles and Ellen Schildtknect served as his first-line supervisors. Lynch, however, who was Rodriguez' second-line supervisor, and who was known throughout the division as a "hands-on" supervisor, routinely dealt directly with Rodriguez, just as she dealt directly with the other custodians in the Janitorial Services Group.

The facts show that Rodriguez began his employment at NIST by performing high-quality work. In fact, during his first few weeks on the job, Lynch stated that she was "impressed" with Rodriguez. One custodial worker asserts that Lynch "bragged" about him, telling other workers how well he was doing his job.

The facts also show, however, that the quality of Rodriguez' work eventually began to disintegrate; he failed to follow proper procedures and often performed tasks too quickly for the result to be acceptable. Other workers began complaining about Rodriguez' "shoddy" work. In addition, several of Rodriguez' co-workers did not like to work with him because he acted like a "know it all" who liked to do things his way only.

Rodriguez alleges that from the outset Lynch exhibited racially hostile behavior towards himself and other non-white employees. Rodriguez alleges that Lynch blatantly favored white employees over minority employees and gave the opinions of Rodriguez' white supervisors more credence than the opinions his African-American supervisors. Rodriguez alleges that Lynch made his life miserable by continually yelling at him, finding fault in his work, giving him unrealistic assignments and isolating him from his colleagues. Rodriguez' African-American supervisors (Wilson and Lyles) testified that they came to believe that Lynch's treatment of Rodriguez was an attempt to compel Rodriguez to resign.

Rodriguez alleges that Lynch singled him out and picked on him because she did not like Hispanics. He complained that Lynch never exchanged pleasantries with him, that Lynch spoke to him as if he were a child, and that Lynch frequently yelled at him for little or no reason. Rodriguez states that he was treated differently from other non-Hispanic employees. As set forth in his EEOC Complaint, Rodriguez alleged that some other examples of this different treatment include: (1) Ms. Lynch never acknowledged him or communicated with him except to assign work or reprimand; (2) Rodriguez was assigned to the mail room initially on a temporary basis; (3) Rodriguez felt isolated and separated from the other workers; (4) Rodriguez was accused falsely of not locking up the recycling storage area; and (5) Rodriguez was assigned to pull trash alone in

a building that was a lot of work to be completed in one day by one person.

The record in this case shows that as the relationship between Rodriguez and Lynch disintegrated, and as the quality of Rodriguez' work diminished, the frequency and severity of Lynch's admonitions increased, and Rodriguez began complaining to his co-workers about Lynch. He objected to the way Lynch "was treating all of us" and complained that the entire custodial staff was "scared" of Lynch. Rabbitt explained that the probable source of the staff's apprehension of Lynch was that "she expects a day's work for a day's wages, and she did not hesitate to tell you if you weren't up to snuff." However, the record also suggests that at times Lynch tended to be overbearing on her employees, and aspired to exact over them a level of control that was ultimately unattainable.

Lynch maintained a file on all of her employees, including Rodriguez. When an issue arose about any employee, Lynch would make note of that issue in that employee's file. In a note dated January 5, 1994, Lynch documented an occasion which gave rise to another employee's (Ms. Shanholtz) refusal to work with Rodriguez because of his purported stubbornness and hostility towards other people's methods. Lynch's file also reflects that on that same day, Rodriguez' supervisor reported his work as "unsatisfactory." Later in the same month, Mr. Lyles, Rodriguez' supervisor, who was African-American, wrote a note for the file complaining of Rodriguez' work performance. Other notes in the file confirmed that Rodriguez repeatedly failed to perform his assigned tasks and refused to follow instructions.

Additional evidence in the record of Rodriguez' performance as an employee at NIST reflects his intransigence and failure to follow instructions. Evidence before the district court showed that Rodriguez balked at wearing the regulation uniform supplied by NIST, stating that he did not like the pants that he was required to wear. On another occasion, Rodriguez failed to attend a mandatory monthly safety meeting for all employees.

Rodriguez' shortcomings as an employee developed to the point where he was unable to perform his required tasks within an eight-

hour work day. Thus, Rodriguez began reporting to work early. Lynch advised Rodriguez that for insurance liability reasons, he was not permitted to begin work before his scheduled shift. However, in an effort to address this problem, Lynch instructed Rodriguez to report his work progress to his supervisor by telephone as he passed from one floor of a building to another so that his progress could be monitored. This was a normal procedure adopted by NIST to conduct time studies of its employees. Rodriguez resented "being timed" in this manner and often refused to call in as he was instructed. On one occasion Rodriguez was asked why he did not call in and he stated: "Hey, I'm not here to keep track of time. I got a job to do."

On or about February 17, 1994 Rodriguez told Rabbitt that he was afraid of losing his job because it appeared that Lynch was harassing him because he was the only Hispanic on the staff. Rabbitt's stated that he would look into the matter and get back to him. Rabbitt asserts that he took notes during this meeting with Rodriguez, but threw the notes away sometime after Rodriguez was fired. At some later time Rabbitt told Lynch that Rodriguez had been in to speak to him.

On or about February 23, 1994 Rodriguez complained in a memorandum to Rabbitt that he was having difficulties at his job and that he and his co-workers were "under distress" because of Lynch. At about the same time, Rabbitt was advised by Lynch and Krista Shanholtz that Rodriguez was overheard threatening to harm Lynch. Rabbitt called for an immediate investigation and assigned James Aycock (security specialist) to lead it. Aycock discovered from the corroborating statements of other employees that Rodriguez had threatened to run down Lynch with his car and "blow her . . . head off." Rodriguez also allegedly said "this could be another mail room massacre." Shanholtz believed that Rodriguez was serious about carrying out the threats. Rodriguez also threatened to cut Dwight Hoffman's throat because Hoffman had reported Rodriguez for leaving the recycling bin open. Finally, another employee heard Rodriguez say that Lynch "could be walking through the parking lot and a car could hit her."

On March 4, 1994, Aycock met with Rodriguez to discuss these threats. Rodriguez declined to complete an affidavit denying the allegations made against him. On March 7, 1994 Rabbitt terminated Rodriguez for having made statements to his co-workers threatening

harm to his supervisor, Lynch. Appellee argues that Rabbitt's decision was made with the concurrence of the personnel office and the Deputy Director of Administration, Karl Bell.

The district court granted summary judgment on the Secretary's behalf on Rodriguez' disparate treatment claim. The court held that in order to survive summary judgment, Rodriguez was required to come forward with sufficient evidence from which a jury could reasonably find that the Secretary discriminated against Rodriguez in the terms, conditions, or privileges of his employment based on his national origin. The district court determined that the acts about which Rodriguez complained did not qualify as *adverse employment actions* under Title VII.

The district court concluded that Rodriguez failed to come forward with any evidence to establish that the Secretary's legitimate nondiscriminatory reason for firing Rodriguez was pretextual. The district court also concluded that Rodriguez could not sustain a retaliation claim because there was no evidence to show that the Secretary's legitimate business reason for terminating Rodriguez was pretextual.

Count One

The Court reviews the grant or denial of summary judgment as a matter of law *de novo*. *Mitchell v. Data General Corporation*, 12 F.3d 1310, 1313 (4th Cir. 1993); *Becerra v. Dalton*, 94 F.3d 145, 148 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1087 (1997).

Count I of the complaint alleges that the Secretary discriminated against Rodriguez in the terms and conditions of his employment on the basis of his national origin. Specifically, Rodriguez complained about (1) his initial temporary assignment to the mail room; (2) Lynch's alleged failure to return his greetings; (3) his assignment to pull trash alone in building 101; (4) his being required to call in his location from every floor; (5) his being accused of not locking the recycling storage area; and (6) generally, the manner in which Lynch allegedly treated him in comparison to other, non-Hispanic employees. Rodriguez contends that several of these issues of material fact remain in dispute, to an extent that a trier of fact could find for the nonmoving party.

The Fourth Circuit has made it clear that Title VII is concerned with the question "of whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981), *cert. denied*, 454 U.S. 92 (1982). Title VII prohibits discrimination that affects the "terms, conditions, or privileges of employment." It does not regulate all activities in the workplace; instead, it regulates only adverse employment decisions. *Page*, 645 F.2d at 233; *Ennis v. National Assoc. of Bus. and Educational Radio, Inc.*, 53 F.3d 55, 57-58 (4th Cir. 1995).

This Court noted in *Page* that "there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the distinct prescriptions of 42 U.S.C. § 2000e-16 and comparable provisions of Title VII." *Page*, 645 F.2d at 233. The district court clearly relied upon this tenet by ruling that the conduct about which Rodriguez complained did not amount to adverse employment actions. Rodriguez does not argue on appeal that any one of Lynch's allegedly discriminatory practices in Count I rises to the level of being an "adverse employment action." Rather, Rodriguez argues, for the first time in this case, that the actions taken against him created a hostile working environment in violation of Title VII.

It is well established that absent plain error, exceptional circumstances, or a fundamental miscarriage of justice, the Court should not address issues raised for the first time on appeal. *Singer v. Dungan*, 45 F.3d 823, 827-28 (4th Cir. 1995); *United States v. One 1971 Mercedes Benz*, 542 912, 915 (4th Cir. 1976). It is also well established that a plaintiff may not bring a discrimination suit to redress matters about which he failed to make an administrative complaint. *Brown v. General Services Admin.*, 425 U.S. 820, 822-33 (1976); *Zografov v. Veterans Admin. Medical Center*, 779 F.2d 967, 968-69 (4th Cir. 1985). However, the Court assumes that while Rodriguez' hostile work environment claim is belated, it can be read into the ambit of Rodriguez' broad disparate-treatment claim, and the Court will therefore address it.

In order to succeed on a hostile work environment claim, Rodriguez must show first that the workplace at NIST was permeated with

discriminatory intimidation, ridicule and insult. To meet his burden of proof, Rodriguez must establish that the conduct about which he complained was severe or pervasive enough to alter the conditions of his employment and create an abusive working environment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 998, 1001 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Carter v. Ball*, 33 F.3d 450, 461 (4th Cir. 1994).

If Rodriguez can prove that Lynch created a hostile working environment for him, the Court must then visit the question of vicarious liability. The Supreme Court has held recently that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 1998 WL 336326 (U.S.) (1998); *Faragher v. Boca Raton*, ___ U.S. ___, 1998 WL 336322 (U.S.) (1998). The Supreme Court held further that when no tangible employment action is taken, a defending employer may raise a two-part affirmative defense to liability or damages, subject to proof by a preponderance of the evidence under Fed. R. Civ. P. 8(c). The employer must prove (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth, supra*, ___ U.S. at ___, 1998 WL 336326 (U.S.) at 15. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id.*

Rodriguez has alleged that Lynch unfairly yelled at him, unfairly criticized his work, and encouraged others to criticize him and exclude him. Rodriguez argues that the "totality of the circumstances" from both an objective and subjective point of view reveals that a hostile work environment did exist. Under controlling case law, the four factors that must be evaluated to assess whether the totality of the circumstances violated Title VII are (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it

unreasonably interferes with an employee's work performance. *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994).

Rodriguez argues under (2) that the harassment was severe and pervasive. The district court concluded as a matter of law that it was not and this Court finds no argument supporting a departure from this reasoning. Rodriguez argues under (3) that Lynch's treatment of him demeaned and threatened him, and weakened his confidence in his job security. It is clear from the record that Rodriguez was not happy at work during the weeks preceding his termination, but it has not been established that Rodriguez' unhappiness resulted solely from a *racially* hostile work environment. Finally, under (4) Rodriguez asserts that Lynch's constant criticism, conflicting instructions and frequent shouting and screaming caused him to perform his work poorly, especially when Lynch assigned him to tasks that were too big for just one janitor. The record shows Rodriguez did indeed raise the ire of his supervisor, Lynch, but there no evidence which suggests that Lynch was any less disagreeable or demanding to any other, similarly-behaving employee in an identical manner.

While Rodriguez apparently believed that he was singled out by Lynch because she purportedly did not like Hispanics, it is not enough to sustain his hostile work environment claim. Instead, this Court has held that what is relevant to this inquiry is *not* what Rodriguez "understood" his employer's motivations to be, but instead, what the employer's motivations actually were. *See, e.g., Evans v. Technologies Applications & Services, Co.*, 875 F.Supp. 1115, 1124 (D. Md. 1995) (Williams, J.), *aff'd*, 80 F.3d 954 (4th Cir. 1996) ("only [the employer's] perceptions about [the employee's] qualifications are relevant."). *See also Williams v. Cerberonics*, 871 F.2d 452, 455 (4th Cir. 1989) (a "plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action.") (citing *Gairola v. Commonwealth of Virginia Dept. Of General Svcs.*, 753, F.2d 1281, 1288 (4th Cir. 1985)).

Simply stated, Rodriguez' hostile work environment claim fails to survive when it is grounded in the allegations contained in his complaint. Lynch was a hands-on manager who was often demanding and perhaps overbearing to her employees. The record shows that Lynch

and Rodriguez did not get along very well on a personal level. The record also shows that Lynch's overbearing tendencies coupled with Rodriguez' indolence as an employee only made the relationship less desirable. For instance, it is clear that Rodriguez often ignored Lynch's instructions, and refused to perform his work in a satisfactory manner. Because of this type of behavior, Lynch reprimanded Rodriguez on several occasions.

Even while it is apparent that Lynch and Rodriguez did not share an amicable relationship, the record is barren of evidence which would suggest that Lynch did not or would not reprimand or otherwise discipline other workers who also failed to perform their tasks properly. In fact, Rodriguez himself conceded that several members of the janitorial staff complained at some time about Lynch's demeanor.

Because Rodriguez fails to make a valid hostile work environment claim this Court does not reach the question of employer liability as it is set forth by the Supreme Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton, supra.*

For these reasons the Court affirms the ruling of the district court as to Count I.

Count Two

In Count II of his complaint, Rodriguez alleged that his "involuntary removal from his position as a Custodial Worker constitute[d] national origin discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1)." The district court concluded that Rodriguez failed to produce any persuasive evidence from which a jury could reasonably find that the defendant's legitimate business-related explanation for terminating Rodriguez was pretextual. We agree with the district court.

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny Rodriguez must establish a prima facie case of discrimination. Specifically, he must show that (1) he is a member of a protected class; (2) he was discharged; (3) at the time of the dis-

charge, he was performing at a satisfactory level, meeting his employer's legitimate expectations; and (4) following his discharge, he was replaced by a person outside the protected class or his employer treated similarly-situated employees outside his class more favorably. *See Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1132 (7th Cir. 1994); *EEOC v. Western Electric Co., Inc.*, 713 F.2d 1011, 1014 (4th Cir. 1983).

The burden then shifts to the Department of Commerce to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If the defendant discharges its burden of production, the plaintiff must be afforded a fair opportunity to show that the reason articulated by the defendant is pretextual.

The defendant asserts that Rodriguez was terminated because he threatened harm to his supervisor, Lynch. Rodriguez advances three arguments in an attempt to show that this reason was pretextual. The Court finds each of appellant's arguments defective.

First, Rodriguez asserts that the Agency did not discipline Lynch for allegedly making the remark that "she would arrange to have someone shoot Mr. Rodriguez." Rodriguez has failed to introduce any evidence which would suggest that Rabbitt was aware that Lynch purportedly made this remark, and thus, Rodriguez cannot show that Rabbitt intentionally declined to discipline Lynch for the same conduct that Rodriguez engaged in.

Second, Rodriguez argues that Rabbitt's conclusion that Rodriguez had made a threat cannot withstand the analysis required under federal personnel law. Specifically, Rodriguez asserts that the threatening statements which were attributed to him do not rise to the level of "threats" as contemplated under *Metz v. Department of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). The Court finds that this analysis is misplaced; the relevant inquiry as it relates to Count II of the Complaint is whether Rabbitt did or did not consider the personnel factors when he chose to terminate Rodriguez. Rodriguez has presented no evidence to show that any such consideration impacted his decision to end Rodriguez' employment.

Rodriguez' reliance on *Metz* is also misplaced because that case involved a challenge of a Merit System Protection Board decision. At

the time of his termination, Rodriguez was a probationary employee and had not yet completed one year of continuous service. Therefore, he was not eligible for protection from adverse actions as adjudicated and enforced by the Merit System Protection Board. Perhaps most importantly, Rodriguez was terminated at NIST and neither attempted nor was ever able to challenge his termination before the Merit System Protection Board.

The law is clear that it is not the province of federal courts to interfere in an agency's legitimate personnel decision. *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir. 1992) (it is not the purpose of the EEOC nor the function of the Court to second guess the wisdom of business decisions); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 245 (4th Cir. 1982) (Title VII was not created to allow the Court to "second guess" the wisdom of an employer's judgment).

Finally, Rodriguez asserts that NIST's decision to terminate him was pretextual on the theory that the agency's disciplinary process acted as the conduit of Lynch's prejudice. The Court regards this contention as nothing more than a far-flung "catch all" argument with no substance whatsoever. The record shows that Rabbitt appointed Aycock to conduct an investigation of the remarks made by Rodriguez and later consulted with various personnel regarding the appropriate action to take. It is also clear that Rodriguez himself refused to sign an affidavit denying he made the alleged threats. Rabbitt's decision to terminate Rodriguez on March 7, 1994 was made with the concurrence of the personnel office and the Deputy Director of Administration, Karl Bell. Nothing in the body of undisputed evidence even remotely suggests that Lynch "used" the Agency's disciplinary processes as the "conduit for her prejudices."

The district court concluded correctly that Rodriguez failed to "demonstrate that [he] was not terminated because of Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal." The district court also noted correctly that Rodriguez did not produce any evidence to show that Rabbitt terminated Rodriguez because of his national origin. In short, the district court did not err in concluding that there was nothing in the record to support a finding that Rabbitt's decision to terminate Rodriguez

was pretextual. For these reasons, we affirm the district court as to Count II.

Count Three

In Count Three Rodriguez alleged that his termination was in retaliation for his complaints of national origin discrimination. Under controlling case law, Rodriguez can prove a prima facie case of retaliation by showing that (1) he engaged in protected activity; (2) the employer took adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994); *Williams v. Cerebronics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). Even if Rodriguez established a prima facie case, he still retains the burden to show that the agency's reason for terminating him was merely pretextual and that the agency intentionally discriminated against him on the basis of his national origin. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993); *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989).

The record establishes that Rodriguez neither sought EEO counseling nor filed a written EEO complaint until after his termination. Thus, Rodriguez is left to argue that he was terminated in retaliation for complaining to Rabbitt about Lynch on February 17, 1994 and for writing a memo to Rabbitt on February 23, 1994 in complaint of Lynch. The evidence shows, however that neither the meeting nor the memo contained any reference at all to national origin discrimination. Rather, there were allegations of mistreatment, intimidation, and manipulation by Lynch against *all* of the employees is the Facilities Services Group. These communications directly contradict Rodriguez' present assertion that he was singled out by Lynch based on his national origin.

Finally the Court finds no causal connection between the protected activity Rodriguez engaged in and the adverse action taken against him. It is well established that "mere knowledge on the part of an employer that an employee . . . has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons" for an adverse employment action. *Williams*, 871 F.2d at 455.

In sum, the record before this Court directly contradicts appellant's assertions that the Secretary's nondiscriminatory reason for terminating Rodriguez was pretextual. The Court therefore AFFIRMS the district court's granting of summary judgment as to Count Three.

Conclusion

For the reasons provided above, this Court affirms the district court's granting of summary judgment as to all Counts of the Complaint.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRUCIT

FILED
October 16, 1998

No. 97-1668
CA-95-710-CCB

IVAN A. RODRIGUEZ

Plaintiff - Appellant

v.

MICHAEL KANTOR, SECRETARY OF COMMERCE OF THE UNTIED STATES OF AMERICA

Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IVAN RODRIGUEZ	:	
	:	Civil Action No.
	:	CCB 95-710
v.	:	
MICHAEL KANTOR, SECRETARY, UNITED STATES DEPARTMENT OF COMMERCE	:	

. . . oOo . . .

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. the defendant's motion for summary judgment is GRANTED;
2. the clerk shall mail copies of the accompanying Memorandum and this Order to all parties; and
3. the clerk shall CLOSE this case.

_____ _____

Date Catherine C. Blake
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IVAN RODRIGUEZ	:	
	:	Civil Action No.
	:	CCB 95-710
v.	:	
MICHAEL KANTOR, SECRETARY, UNITED STATES DEPARTMENT OF COMMERCE	:	

. . . oOo . . .

MEMORANDUM

Now pending is the defendant's motion for summary judgment in this case alleging retaliation and discrimination on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964, ("Title VII"), 42 U.S.C. § 2000e et seq. This matter has been briefed fully, and no hearing is necessary. See Local Rule 105.6. For the reasons set forth below, the defendant's motion for summary judgment will be granted.

BACKGROUND

On December 18, 1992, the National Institute of Standards and Technology ("NIST") posted a vacancy announcement for nine custodial worker positions. (See Def.'s Mot. Summ. J. Ex. 6.) The plaintiff, a male of Hispanic origin, applied for one of those positions. (See Rodriguez SF-171, Def.'s Mot. Summ. J. Ex. 7.) In accordance with the government's competitive hiring guidelines, NIST's personnel department rated all qualified applicants based on their experience and qualifications and then ranked them; the list of ranked candidates was then sent to the hiring official. (See Lynch

Dep. at p. 151, Pl.'s Opp'n Ex.2.) Generally, the hiring official is constrained to follow the rankings when making hiring decisions and only may select a lower-ranked candidate over a higher-ranked candidate after having rejected the higher-ranked candidate for legitimate reasons. (See id. at pp. 155-56; Rabbitt Dep. at p. 150, Pl.'s Opp'n Ex. 3.) Based on Mr. Rodriguez's ranking and his interview, Ms. Lynch, the hiring official tentatively offered him a position. (See Lynch Dep. at p. 155, Pl.'s Opp'n Ex. 2; see also Rabbitt Dep. at p. 147, Pl.'s Opp'n Ex. 3.) Soon after, allegedly because she believed that Mr. Rodriguez had falsified information on his application, Ms. Lynch attempted to rescind the offer. (See Def.'s Mot. Summ. J. Ex. 10) Other employees reported, however, that Ms. Lynch did not want to hire Mr. Rodriguez because he was Hispanic. Charles Lyles, Mr. Rodriguez's immediate supervisor stated:

> Before Mr. Rodriguez was hired, Ms. Lynch told [m]e that she did not want to hire any foreigners. At a later date, Ms. Lynch said, "Mr. Rodriguez, who is Spanish and from New York will be coming on board[.] I do not want to hire him, but I have no choice." (Lyles Aff., Pl.'s Opp'n Ex. 5.) Another supervisor, Henry Wilson, also stated,

> > Sometime, I believe it was during the month of November 1993, Ms. Lynch entered my work area and said, "I have to hire this son of a bitch whether I want to or not." I asked her who she was referring to and she said, "this guy Rodriguez . . . . [A]s you know, Hispanics and Blacks do not get along together. If I had my way, I would not hire Hispanics."

(Wilson Aff., Pl.'s Opp'n Ex. 6.) A support clerk, Delores Christian stated,

> [Ms. Lynch] also said that she did not like [Mr. Rodriguez] because he was Hispanic and she believed that Hispanics and blacks do not get along.
>
> On another occasion before Mr. Rodriguez reported for duty, Ms. Lynch told me that Hispanics and Vietnamese come to this country and take jobs from Americans.

(Christian Aff., Pl.'s Opp'n Ex. 7.) Ultimately, Mr. Rabbitt, Ms. Lynch's supervisor, did not support Ms. Lynch's request for withdrawal of the offer, (see Pl.'s Opp'n Exs. 9-10), and Mr. Rodriguez was hired.

Mr. Rodriguez began working at NIST on December 13, 1993. (See Rodriguez Aff. ¶ 2, Pl.'s Opp'n Ex. 11.) Once on the job, Mr. Rodriguez states that he was treated differently from other non-Hispanic employees. Some examples of this different treatment include: (1) Ms. Lynch never acknowledged him or communicated with him except to assign work or reprimand him, (see EEOC Compl., Pl.'s Opp'n Ex. 15); (2) Mr. Rodriguez was assigned to the mailroom initially on a temporary basis; (see id.); (3) Mr. Rodriguez felt isolated and separated from the other workers, (see id.); (4) Mr. Rodriguez was accused falsely of not locking up the recycling storage area, (see id.); and (5) Mr. Rodriguez was assigned to pull trash alone in a building that was a lot of work to be completed in one day by one person, (see id.; see also Lyles Aff., Pl.'s Opp'n Ex. 5 ("[H]e performed [the pulling of the trash in building 101] alone, which is a lot of work for one person to accomplish in an 8 hour shift.")).

On February 17, 1994, Mr. Rodriguez complained to Mr. Rabbitt, Ms. Lynch's supervisor, about Mr. Lynch's treatment of him and expressed his concern that Ms. Lynch was treating him this way because he was Hispanic. (See Rodriguez Aff. ¶ 3-6, Pl.'s Opp'n Ex. 11.) Mr. Rabbitt said that he would look into the matter and get back to him. (See

id. ¶ 7.) Mr. Rabbitt took notes during his meeting with Mr. Rodriguez, but threw the notes away sometime after Mr. Rodriguez was fired. (See Rabbitt Dep. at pp. 209-10, Pl.'s Opp'n Ex. 3.) Mr. Rabbitt told Ms. Lynch that Mr. Rodriguez had been in to speak to him. (See Lynch Dep. at p. 272, Pl.'s Opp'n Ex. 2.)

On or about February 23, 1994, Ms. Lynch came to Mr. Rabbitt with Krista Shanholtz, a custodial worker, who claimed that she and two other custodial workers had heard Mr. Rodriguez threaten to harm Ms. Lynch. (See Rabbitt Dep. at pp. 220-23, Def.'s Mot. Summ. j. Ex. 13.) Mr. Rabbitt then asked Jim Aycock to investigate the matter. (See id. at p. 224.) Mr. Aycock interviewed the three employees who allegedly had heard Mr. Rodriguez make the threats and took their sworn affidavits, but Mr. Aycock did not interview Mr. Rodriguez before completing the inquiry. (See Aycock memo dated 2/24/94, Pl.'s Opp'n Ex. 18.) Ms. Shanholtz stated that in January 1994 Mr. Rodriguez threatened to run Ms. Lynch over with a car, and that in February 1994 he said, "This could become another mail room massacre." (See Shanholtz Aff., Def.'s Mot. Summ. J. Ex. 23.) Ms. Shanholtz believed that Mr. Rodriguez was serious about carrying out the threats. (See id.) Jerome Orye stated that in February 1994 Mr. Rodriguez said that "a car could hit Ms. Lynch in the parking lot." (See Orye Aff., Def.'s Mot. Summ. J. Ex. 21). George Clary stated that in late January or early February 1994, he had heard Mr. Rodriguez say that he was going to slit Ms. Lynch's throat and run her over with his car. (See Clary Aff., Def.'s Mot. Summ. J. Ex. 30.) Shortly thereafter, after reviewing Mr. Aycock's report and consulting with personnel, Mr. Rabbitt decided to terminate Mr. Rodriguez's employment with NIST. (See Rabbitt Dep. at pp. 308-09, Pl.'s Opp'n Ex. 3.) On March 4, 1994, Mr. Aycock met with Mr. Rodriguez and confronted him with the allegations made by his three co-workers. (See EEO Compl. filed 6/1/94, Pl.'s Opp'n Ex. 15.) Mr. Rodriguez denied having made the threats. (See id.) On

March 7, 1994, Mr. Rabbitt terminated Mr. Rodriguez from his job as custodial worker with NIST for having made statements to his co-workers threatening harm to his supervisor; Ms. Lynch. (See id.; see also Rabbitt Memo dated 3/7/94, Pl.'s Opp'n Ex. 22.)

ANALYSIS

Rule56(c) of the Federal Rules of Civil Procedure provides that:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Supreme Court has clarified that this does not mean any factual dispute will defeat the motion:

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

Moreover, the Supreme Court has explained that the Rule 56(c) standard mirrors the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The Court has stated that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249; see also Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 115 S. Ct. 67, 68 (1994); Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992), cert. denied, 113 S. Ct. 1415 (1993). "The party opposing a properly supported motion for summary judgment may not

rest upon mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Ravine Trawlers unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 (4th Cir. 1988). The court must "view the facts and draw reasonable inferences in a light most favorable to the nonmoving party," Shaw, 13 F.3d at 798, but it also must abide by its affirmative obligation to ensure that factually unsupported claims and defenses do not proceed to trial. See Felty v. Graves-Humphreys Co., 818 F.2d1126, 1128 (4th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)). "[A] defendant . . . should not be required to undergo the considerable expense of preparing for and participating in a trial" unless the plaintiff has produced evidence on which a jury might rely in support of the claims alleged. E.F. Hutton Mortgage Corp. v. Equitable Bank, N.A., 678 F. Supp. 567, 573 (D. Md. 1988).

In the first count of his complaint, Mr. Rodriguez alleges he was subjected to disparate treatment because he was Hispanic in violation of Title VII. "In order to prevail on [a] . . . Title VII claim, a plaintiff must prove that 'but for the employer's motive to discriminate against the employee because of the employee's . . . [national origin], the employee would not have suffered the [adverse employment] action.'" Caussade v. Brown, 924 F. Supp. 693, 699 (D. Md. 1996) (quoting Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir. 1992), cert. denied, 507 U.S. 918 (1993)), aff'd, 107 F.3d 865 (4th Cir. 1997). Mr. Rodriguez may prove his claim either with direct or indirect evidence supporting an inference of discrimination or with the burden-shifting proof scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See id.

Under either proof scheme, Mr. Rodriguez must demonstrate that he suffered adverse employment action. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("The employment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred."), cert. denied, 475 U.S. 1082 (1986).

To qualify as an adverse employment action, an action must constitute an "ultimate employment decision" such as firing, granting leave, discharging, promoting, or compensating. See Raley v. Board of St. Mary's County Comm'rs, 752 F. Supp. 1272, 1281 (D. Md. 1990) (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892 (1981)). Adverse employment actions are not limited to those specifically enumerated in Page, see 645 F.2d at 233, but the action complained of must affect the terms, conditions, and privileges of employment in an equally serious way.

Mr. Rodriguez relies on several instances of allegedly unfair treatment to show he is entitled to recover including: his initial temporary assignment to the mailroom, Ms. Lynch's failure to return his greetings, his assignment to pull trash in building 101 alone, his being required to call in his location from every floor, his being accused wrongly of not locking up the recycling storage area, and generally Ms. Lynch's harsh way of dealing with him in comparison to other non-Hispanic workers. (See EEO Compl., Pl.'s Opp'n Ex. 15.) These alleged discriminatory actions do not qualify as adverse employment actions. See Page, 654 F.2d at 233 ("[T]here are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII."); Caussade, 926 F. Supp. at 701 (holding that transfer without loss in title, grade, salary, or benefits did not qualify as adverse employment action); Ward v. Johns Hopkins Univ., 861 F. Supp. 367, 377 (D. Md. 1994) (holding that employer's failure to speak to employee and giving employee less favorable assignments in a dirtier par of the office did not amount to adverse employment actions).[1]

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[1] To the extent Mr. Rodriguez is alleging he suffered form harassment that created a hostile work environment, his claim still fails because he has not shown the complained of actions were severe and pervasive enough to create an abusive working environment. See Harris v.

The only action that approaches an adverse employment action is Mr. Rodriguez's assignment to pull the trash in building 101 alone. Even if this action qualified as an adverse employment action, Mr. Rodriguez's claim ultimately would fail because Mr. Rodriguez has not demonstrated that "but for" Ms. Lynch's discriminatory motive he would not have been given the same assignment. The defendant introduced evidence that the pulling of the trash in building 101 regularly had been assigned to one person both before and after Mr. Rodriguez was employed at NIST. (See Schildtknecht Aff. ¶ 2, Def.'s Reply Ex. A.) In support of his position, Mr. Rodriguez offers the affidavit of his supervisor, Mr. Lyles, who states that pulling the trash in building 101 is a lot of work for one person. (See Lyles Aff., Pl.'s Opp'n Ex. 5.) Because Mr. Rodriguez has not convincingly disputed the defendant's evidence that other non-Hispanics were assigned to pull the trash in building 101 alone, he has failed to raise an inference of discrimination. For this reason and because none of the complained of actions qualify as adverse employment actions, Mr. Rodriguez's disparate treatment claims fails.

Mr. Rodriguez next argues that the defendant violated Title VII by terminating Mr. Rodriguez because he is Hispanic. Mr. Rabbitt make the decision to terminate Mr. Rodriguez, and Mr. Rodriguez has introduced no direct or indirect evidence that Mr. Rabbitt had any discriminatory purpose in firing Mr. Rodriguez. Under the McDonnell Douglas proof scheme, Mr. Rodriguez may demonstrate a prima facie case of discriminatory discharge by showing that: (1) [he] is a member of a protected class; (2) [he] was qualified for the job and performed the job satisfactorily; (3)

Forklift Sys., Inc., 510 U.S. 17, 23 (1993); see also Long v. First Union Corp. of Va., 894 F. Supp. 933, 944 (E.D. Va. 1995) (finding, in the retaliatory harassment context, that a supervisor's cold treatment and delegation of duties did not constitute harassment).

in spite of [his] qualifications and performance, [he] was discharged; and (4) the position remained open to applicants with similar qualifications after [his] dismissal." Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994); accord Williams v. Cerberonics, Inc., 871 F.2d 452, 455 (4th Cir. 1989).

Arguably Mr. Rodriguez could demonstrate a prima facie case. The only element of his prima facie case that was disputed by the parties was whether Mr. Rodriguez was performing his job satisfactorily. Mr. Rodriguez submitted affidavits from his first-line supervisors, however, demonstrating that the was qualified for the job and was performing satisfactorily. (See Lyles Aff., Pl.'s Opp'n Ex. 5; Wilson Aff., Pl.'s Opp'n Ex. 6.) Thus, at a minimum, these issues could go to trial.

Assuming without deciding, however, that Mr. Rodriguez has made his prima facie case, he has offered no persuasive evidence that the defendant's legitimate business-related explanation for his firing is a pretext for discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993); Bodoy v. North Arundel Hosp., 945 F. Supp. 890, 897 (D. Md. 1996). To demonstrate that NIST's reasons are pretextual, Mr. Rodriguez must show that "as between [his national origin] and the defendant's explanation, [national origin] was the more likely reason for the dismissal, or that the employer's proffered explanation is simply 'unworthy of credence.'" Tuck, 973 F.2d at 375 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). Moreover, to carry his burden of proof, Mr. Rodriguez must rebut the specific reason given by NIST for his firing. See Lenoir v. Roll Coater, Inc., 13 F.3d 1130, 1133 (7th Cir. 1994). Mr. Rodriguez was terminated specifically because Mr. Rabbitt believed that Mr. Rodriguez threatened to harm Ms. Lynch in front of his co-workers; this belief was based on the affidavits of the three employees in Mr. Aycock's report. (See Rabbitt Dep. at pp. 305-09, Def.'s Mot. Summ. J. Ex. 13.) In proof of the reasonableness of Mr. Rabbitt's action, NIST has produced affidavits from

the three employees who still maintain that they heard Mr. Rodriguez make these threats. (See Shanholtz Aff., Def.'s Mot. Summ. J. Ex. 23; Orye Aff., Def.'s Mot. Summ. J. Ex. 21; Clary Aff., Def.'s Mot. Summ. J. Ex. 30.) In addition, the action taken by Mr. Rabbitt was within the range of penalties for this type of misconduct recommended in the agency's personnel guidelines. (See Table of Offenses and Penalties at p. 7, Def.'s Reply Ex. B.)

To demonstrate this reason is pretextual, Mr. Rodriguez complains that he did not threaten Ms. Lynch, and that the investigator failed to interview him before completing his investigation. These arguments, even if true, fail to demonstrate that Mr. Rodriguez was not terminated because of Mr. Rabbitt's good faith belief that Mr. Rodriguez did engage in misconduct serious enough to warrant dismissal. See Lenoir, 13 F.3d at 1134 (finding that even if plaintiff established that the investigation into her misconduct led to an incorrect result or was not as thorough as it should have been, these facts did not create an issue for trial). He also suggests that the employees who complained about the threats lied at ms. Lynch's request, but offers insufficient evidence to support this allegation. Of critical importance to his claim, Mr. Rodriguez has offered no persuasive evidence that Mr. Rabbitt was aware of Ms. Lynch's alleged discriminatory animus or the other employees' possible motive to falsify their affidavits or that Mr. Rabbitt would have reached a different conclusion even if her were aware of all the evidence presented by Mr. Rodriguez. Thus, he has failed to create any doubt that Mr. Rabbitt's decision was based on a reasonable belief that Mr. Rodriguez made the threats.

As further evidence that NIST's decision was pretextual, Mr. Rodriguez contends that non-Hispanics were not treated similarly for comparable misconduct. In proof of his claim, he has reproduced a chart with vague descriptions of employee misconduct and the corresponding punishment received by unidentified offending employees. (See Pl.'s

Opp'n at pp. 22-23.) Mr. Rodriguez has not provided the underlying facts supporting the findings of misconduct, however, nor has he demonstrated that these non-Hispanic employees were probationary employees like Mr. Rodriguez. Thus, on this record, it is impossible to determine whether the misconduct was comparable and the employees were similarly situated. Mr. Rodriguez's own conclusory assertions that the misconduct was comparable and the employees were similarly situated fails to create an issue for trial. See Goldberg v. B. Green and Co., 836 F.2d 845, 848 (4th Cir. 1988); Rudolph v. Hechinger Co., 884 F. Supp. 184, 188 (D. Md. 1995). Accordingly, Mr. Rodriguez cannot succeed on this claim.

Finally, Mr. Rodriguez argues that he was fired in retaliation for complaining to Mr. Rabbitt about Ms. Lynch's discriminatory actions. To prove a prima facie case of retaliation, Mr. Rodriguez must show by a preponderance of the evidence that: "1) [he] engaged in protected activity; 2) the employer took adverse employment action against [him]; and 3) a causal connection existed between the protected activity and the adverse action." Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). Again, it appears that Mr. Rodriguez may have established a prima facie case of retaliation because of the temporal proximity of his complaints and his termination. Nonetheless, for the reasons explained above, he has failed to demonstrate that his employer's legitimate business reasons for his firing are pretextual and thus, he has failed to carry his ultimate burden of proof. See St. Mary's Honor Ctr., 509 U.S. at 507-508. Accordingly, summary judgment will be granted on all of Mr. Rodriguez's claims.

A separate Order follows.

_____ _____

Date

Catherine C. Blake
United States District Judge

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.